No. 20236

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES RUBBER COMPANY,

Appellant,

v.

FRANCIS WRIGHT and MATT S. HUGHES, Trustee in Bankruptcy for Hank Wright's Sons, Inc., a corporation, and MATT S. HUGHES, Trustee in Bankruptcy for Francis Wright,

Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge

ARTHUR S. VOSBURG,
FRANK McK. BOSCH,
VOSBURG, JOSS, HEDLUND & BOSCH,
909 American Bank Building,
Portland, Oregon 97205,
Attorneys for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

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PRELIMINARY STATEMENT

Appellant in discussing appellees' answering brief will do so under the same specifications of error set forth in its opening brief.

ARGUMENT

I

1. The contentions of appellees applicable to the claim of Francis Wright as an individual fail to state a claim upon which relief can be granted appellee Francis Wright and the District Court erred in not dismissing said claim for the following reasons:

> **(a) Francis Wright does not claim that appellant breached the contract which said appellee alleges was entered into between said appellee and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.**

Appeleles seek to avoid appellant's challenge to the legal sufficiency of the *facts* pleaded (contended) by appellees in the pretrial order with respect to the individual claim of Francis Wright for damages to his credit and standing in the community by drawing attention to certain conclusionary language used in the contentions.* This appellees may not do.

Appellant's motion with respect to this cause of action is a motion under Rule 12(b)(6). Such a motion is deemed to admit the well-pleaded facts of the complaint but is not deemed to admit conclusions of law or unwarranted deductions of fact, 2 *Moore's Federal Practice,* Second Ed., n. 4, Par. 12.08 and cases there cited, p. 2244.

Appellees try to get away from the inescapable con-

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* Appellant could not make this challenge prior to the time it did because this cause of action did not appear in the prior pleadings.

clusion of the *facts* pleaded in contentions 7, 13, 14 and 15, that is, that for a certain consideration appellant agreed to enter into a certain contract with a corporation to be formed and that appellant did enter into such a contract with the corporation, thereby fully performing the first contract. Appellees try to do this by pointing to the words "contract with the plaintiff Francis Wright" and the words "said contract" in contention 17. The inescapable conclusion of contentions 7, 13, 14 and 15 is that by January 23, 1962, the time referred to in contention 17, there was no contract with Francis Wright. It died on or about December 26, 1961, when appellant entered into the contract with the corporation. Appellees' mere reference to the earlier contract cannot legally resurrect it. Such reference is an unwarranted deduction from the prior-pleaded facts or an erroneous conclusion of law.

At page 9 of appellees' brief they take a cavalier attitude to the contentions of fact in the pretrial order. They regard them as nothing more than a repetition of notice pleading. As the court knows, by rule, the pleadings pass out of the case once the pretrial order is signed, and the purpose of this order, *inter alia,* is to pin down the parties to the precise facts and theories they plan to prove. Appellees had the opportunity from the time the original plaintiffs were adjudicated bankrupts to carefully formulate their theory and marshal their facts. By comparing appellees' original pleadings to their contentions in the pretrial order the court will see that they have freely taken advantage of that opportunity. Appellees at this time should stand on the contentions they wrote into the pretrial order.

Moreover we do not agree with appellees' suggestion at pages 9 and 10 of their brief that simple changes of language would remedy the situation. Reciting the word "contract" in the plural form in contention 17 would not change the facts and necessary legal conclusions flowing from contentions 7, 13, 14 and 15 of the pretrial order. The first contract was dead. The next suggested change in language on page 10 would not change matters at all because "such contract" in the phrase "and pursuant to such contract it would extend credit" etc. would still refer to the "subsequent contract" to be entered into with the corporation and it would be only to the corporation that appellant would be liable for failure to carry out the terms thereof.

Finally, on page 10 of their brief appellees ask the court to accept their A, B and C illustration. While it may or may not, depending on the facts, legally be the same for A to agree with B that it will enter into a contract with C containing certain terms as it is for A to promise B that it will do certain things for C, this illustration totally ignores the additional fact appellees pleaded in the instant case, viz., A did enter into the contract with C, so that the illustration of appellees is not comparable on the facts actually alleged.

Appellees are trying to create rights in a party out of a factual situation they have carefully alleged when no such rights legally exist. The broken contract, if there was one, was with C, the corporation, and not with B, the individual. C should be able to sue, as it does in another part of this action, for breach of the contract between A and C, but B should not be able to do so.

Appellees should not be allowed to perform this bit of legerdemain, to give B the same rights as C, and in the process pervert the purpose of pretrial orders. We reiterate that the claim of appellee Francis Wright should be dismissed for the simple reason that it fails to allege a breach of contract.

(b) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant and that appellant breached this contract the damages claimed for breach of this contract by appellee Francis Wright, namely, damage to his credit and impairment of his standing in the community, are not proper elements to be considered in assessing damages for breach of a commercial contract of the type alleged.

The individual appellee, Francis Wright, is attempting to obtain damages for claimed injury to his credit and for the lowering of his standing in the community. It should be specifically noted that appellees have been unable to find a single case—and as a matter of fact neither has appellant—where such damages have been awarded *to an individual* where there has been a breach of a contract to render financial assistance *to a corporation.*

As mentioned in our opening brief, such damages are something like humiliation and mental anguish and generally are non-recoverable in a suit for breach of a commercial contract. All of the cases cited by appellees are either pure tort cases which allow recovery for humiliation and mental anguish as a result of an unlawful di-

rect touching of plaintiff's personality, or are contract cases not involving loss of credit or mental anguish at all, or are contract cases falling within the few exceptions to the general rule of non-recovery recognized by *Williston On Contracts,* Rev. Ed. Vol. V, Sec. 1340 and *The Restatement of Contracts,* Sec. 341. The exceptions go off on the theory that mental suffering may be recovered where the contract was of such character (that is, where more than pecuniary benefits were contracted for) that the promisor had reason to know when the contract was made that breach would cause mental suffering for reasons other than mere pecuniary loss. None of appellees' cases involves a fact situation like the one alleged in appellees' contentions. As a matter of law, appellees' contentions fall short of what is necessary as a condition of being allowed to prove the damages claimed by the individual appellee Francis Wright.

In the instant case we start from and must always keep in mind the cardinal pleaded fact that a corporation was to be financed. It was the vehicle by which the alleged arrangements were to be implemented. It is this feature, among others, that distinguishes and disposes of appellees' cases.

Hinish v. *Meier & Frank Co.,* 166 Or. 482, 113 P.2d 438, cited on pages 11 and 12 of appellees' brief, *Quillen* v. *Schimpf,* 133 Or. 581, 291 P. 1009, cited at page 12 of appellees' brief, and *Sager* v. *Sisters of Mercy of Colorado,* 81 Colo. 498, 256 P. 8, cited at page 13 of appellees' brief, are all pure tort cases. We could cite many such tort cases where damages for humiliation and metal anguish have been allowed. However, in all of these cases

the injury was directly to the individual personality of the party.

Turning now to the cases cited by appellees which are based on breach of contract: In *Coffey* v. *Northwestern Hospital Association,* 96 Or. 100, 183 P. 762, 189 P. 407, the *ad damnum* claim included humiliation and mental anguish among other items of damage, principally great bodily pain and suffering, but there was no issue raised as to the particular items of damage. There was a general verdict and the appeal concerned itself with the question of whether plaintiff or defendant breached the contract. In any event, as the court stated, while the basis of the action was a contract, the breach thereof sounded in tort. Further, the case stands within the well-defined exception to the general rule allowing such recovery in certain peculiar instances discussed in appellant's opening brief.* Finally, there certainly was no corporation involved on the plaintiff's side of the case.

Merchants Bank of Canada v. *Sims,* 122 Wn. 106, 209 P. 1113, cited on page 11 of appellees' brief, is clearly not in point in that in this case the guarantors of the debt of a corporation were merely allowed to assert as a defense to a suit on their guarantees the loss *to the corporation* resulting from the plaintiff's failure to loan the corporation the sum of money agreed upon. This case might be stretched to cover damages for a loss of

* A more analogous type of medical case would be *Adams* v. *Brosius,* 69 Or. 513, 139 Pac. 729 (1914) in which the plaintiff's husband who employed a doctor could not recover for his mental suffering for the doctor's breach of his contract to attend the husband's wife during childbirth.

an investor's pecuniary investment in a corporation, but it certainly did not involve and certainly may not be read as an authority for the proposition that damage to an individual investor's personal credit and personal standing in the community is recoverable for failure to make a loan to a corporation.

Appellees' closest case in our view is *Westensen* v. *Olathe State Bank,* 78 Colo. 217, 240 P 689, cited at page 11 of appellees' brief. The plaintiff was there allowed to recover for his personal humiliation for breach of a contract to honor his personal checks based on a personal loan he negotiated with the defendant bank immediately prior to a trip to California. The defendant knew plaintiff would be far from home and among strangers. It was his personality which was directly touched with the defendant's breach and defendant when it made the breach under the facts of the case must have known that he would be so touched if it did not perform. Such a right to recover under these peculiar circumstances is a well-recognized exception to the general rule where an inference of dishonesty or crime on the part of the maker of a dishonored check could readily be drawn. However, in our case the parties at the time of the alleged agreement to make the loan contemplated that the personality of a corporation was to be interposed and it indeed was the one to be financed. It was the one that would be affected by any breach. We will shortly see that appellees' own allegations, under the principle of *Hadley* v. *Baxendale,* provide no basis for any inference that appelant had reason to know at the time the contract to finance the corporation was made that indi-

vidual appellee's credit or standing in the community would be touched at all, if appellant failed to perform.

Appellees are in error on page 11 of their brief (toward the end of the first paragraph) when they assert that foreseeability of damages is judged as of the time of breach of contract. It is what the parties knew or should have known with respect to probable damages at the time the *contract was entered into* that is controlling. See *The Restatement of Contracts,* § 341 at pages 559-560 cited at pages 18-19 of our opening brief, the case of *Dalton* v. *Waggoner,* 30 S.W.2d 665, cited at page 12 of appellees' answering brief, and *Brunson* v. *Ranks Army Store,* 161 Neb. 519, 73 N.W.2d 803, cited at pages 20-21 of our opening brief. Appellant submits that the elements of foreseeability prescribed by *Hadley* v. *Baxendale* are far exceeded by appelles' claim in this case.

Let us look at the appellees' contentions with respect to the circumstances at the time of contracting for the loan to the corporation. One looks in vain for any contention at all about knowledge giving rise to any risk to the individual appellee's general standing in the community. The only allegation concerning defendant's knowledge at that time with respect to the individual's credit is that appellant knew that appellee had an excellent but limited credit standing (Plaintiffs' Contention 2, R. 13). Although it does not speak as of the time of making the contract, Plaintiffs' Contention 12, R. 15, states that the corporation obtained credit only because of the credit of the individual, Francis Wright, and the promises of the defendant to loan money. This conten-

tion is relied upon by appellees in their brief, bottom of page 10 and top of page 11, as a sufficient basis to allow recovery from appellant for damages to the individual's credit and his general standing in the community. Even if somehow, at the time the contract was entered into, knowledge that appellee-plaintiff was in general going to use his excellent though limited credit standing to help finance the corporation could be imputed to appellant, we submit that such knowledge would still fall far short of what is required to be alleged to recover the special damages the individual appellee is trying to obtain in this case. *There are no allegations of any facts relating to the time of the making of the contract to finance the corporation, upon which a conclusion could be based that appellant should have anticipated that if it did not live up to the contract, the individual plaintiff would go so far beyond the limits of his own financial capacity that his individual credit standing and his general standing in the community would be adversely affected.* What appellees allege in Plaintiffs' Contention 11, R. 15, is totally beside the point because it all came after the last possible contracting date for the loan. If the court, as it should, looks at the circumstances as of the time the contract was made, and particularly if the court holds that the individual appellee Francis Wright can sue because of the earlier of the two contracts alleged, the only other thing the court will find is that the individual plaintiff had just recently had a personal backer, Plaintiffs' Contention 5, R. 13-14, and that the individual had been planning to enter the business since early 1961.

It may be argued that based on appellees' contentions as of the time of the making of the agreement to finance the corporation, appellant should have anticipated at that time that damages and financial loss to the corporation would result, that the individual Francis Wright might lose some out-of-pocket expenses and his time, and possibly that the individual might lose his financial investment in the corporation if appellant did not keep its promise. Appellees are pursuing all these remedies in other causes of action. But appellee Francis Wright wants more from the alleged breach of contract to finance the corporation. He wants this court to allow him to recover special damages for injury to his credit and for lowering of his standing in the community, which depend upon relationships with many other parties, when there is absolutely no basis in the allegations that he has made from which appellant should have understood at the time the alleged agreement to finance the corporation was made that the individual appellee would go so far beyond his own financial capacity that he would endanger these relations with other parties if appellant did not make loans to the corporation. Under the circumstances of this case and all of the authorities cited, we submit that it would be without authority, an error as a matter of law, and unfair for this court to allow a jury to consider damages of the nature claimed by appellee Francis Wright even if they did occur. The implications for all ordinary commercial transactions if such recovery is allowed to be considered in this case would be widespread and unsettling, to say the least.

(c) Even assuming that a valid contract was entered into between appellee Francis Wright and appellant, that appellant breached this contract, and that damages for loss of credit and impairment of standing in the community are proper elements to be considered in assessing damages, title thereto would pass to the trustee in bankruptcy for Francis Wright.

In discussing this specification of error appellees assert that this court should treat the claim of appellee Francis Wright for damages suffered as a result of his alleged loss of credit and the lowering of his standing in the community as though they arose out of a tort committed against the person of Francis Wright—that this court should disregard the label and look to the substance and treat the damages as personal to Francis Wright and not as passing to his trustee in bankruptcy. The objection to this reasoning is that if Francis Wright suffered any damage it arose not because of any tortious action on the part of appellant but because appellant breached a commercial contract. It is absurd to say that the damages came into existence because of a breach of a contract and in the same breath say that after being so created they should be treated as though they arose out of tortious acts of appellant. In fact the argument of appellees only accentuates our previous contention that no such damages could have been in the contemplation of the parties at the time the first alleged contract was entered into in the event of a breach thereof.

As to the argument what difference does it make as

to whether the claim still remains vested in appellee Francis Wright or passed to his trustee in bankruptcy so long as appellant does not have to pay double, we make this answer: At some stage of the pleadings the parties have to take a position from which they cannot deviate. Here in the face of the knowledge of all the facts as to the dealings between the parties the appellee-trustee has taken the position that the claim for damages is vested in appellee Francis Wright—a definite disclaimer and waiver.

(d) The claimed contract between appellee Francis Wright and the appellant was void because of indefiniteness and uncertainty.

In discussing Specification of Error I (d) appellees refer the court to Plaintiffs' Contention 14, R. 15-17, the promises made to Hank Wright's Sons, Inc., as though these promises were made by appellant to appellee Francis Wright at the time the first alleged contract was entered into, which we submit is not the case. The alleged promises that appellant made to Francis Wright were simply an indefinite agreement to extend credit, etc., to a corporation to be formed by appellee Francis Wright, Plaintiffs' Contention 7, R. 14. This promise was clearly too indefinite and uncertain to constitute an enforceable contract.

II

2. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in brankruptcy for Francis Wright, fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Francis Wright, and the district court erred in not dismissing said claim for the following reasons:

(a) Appellee Matt S. Hughes, trustee in bankruptcy, does not claim that appellant breached the contract claimed to have been entered into between Francis Wright and appellant, and in fact, affirmatively alleges that appellant fully performed this contract.

(b) The claimed contract between appellee Francis Wright and Appellant was void because of indefiniteness and uncertainty.

No further discussion of this specification of error is deemed necessary.

III

3. The contentions of appellees applicable to the claim of Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., fail to state a claim upon which relief can be granted appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., and the district court erred in not dismissing said claim for the following reason:

(a) The purported contract claimed to have been entered into between Hank Wright's Sons, Inc. and appellant on or about December 26, 1961, was void because of indefiniteness and uncertainty.

At the inception of their argument relative to this specification of error appellees state that the purpose of Plaintiffs' Contentions is to give defendant notice of the

nature of the contract upon which plaintiff relies and not to list all of the evidence expected to be adduced. We take issue with this statement. The Contentions of Plaintiffs, which supersede the pleadings and the complaint, must assert a claim upon which relief can be granted. If a good cause of action is set forth it is up to the defendant to meet any factual situation that may occur within the framework of the pleadings. In our opening brief we showed that the contract between Hank Wright's Sons, Inc. and appellant entered into on or about December 26, 1961, was so indefinite and uncertain as not to constitute an enforceable contract and we do not believe that the argument of appellees has in any way weakened this position. The mere fact that the damages claimed do not include a claim for loss of profits is immaterial, the sole question being whether the contract was definite and certain enough to constitute an enforceable contract.

IV

4. Judgment on the pleadings as to the claim of appellee Matt S. Hughes, trustee in bankruptcy for Hank Wright's Sons, Inc., without prejudice to appellant's counterclaims should be granted for the reason that:

> **(a) The bilateral contract between Hank Wright's Sons, Inc., and appellant entered into on or about December 26, 1961, was void for lack of mutuality, there being no consideration for the promises of appellant;**
>
> **or**
>
> **(b) Said contract was expressly superseded by the bilateral contract between Hank Wright's Sons, Inc., and appellant entered into December 27, 1961.**

Appellees in treating this specification of error state that the "contract of December 26, 1961 was neither (a) void for lack of mutuality nor (b) superseded by Exhibit A." Appellant does not propose to discuss the technical distinction, if there is one, between lack of mutuality of obligations and lack of consideration. What appellant is asserting by Specification of Error IV (a) is simply that if Exhibit A was executed prior to the alleged contract of December 26, 1961, no binding contract was entered into between Hank Wright's Sons, Inc. and appellant at the latter time because there was no consideration for the alleged promises of appellant as Hank Wright's Sons, Inc. agreed to do nothing that it was not already obligated to do by virtue of the promises contained in Exhibit A. Therefore the discussion of appellees under Specification of Error IV (a), pages 23-24 of appellees' answering brief relating to "mutuality," the cases cited,

and the reference to Corbin, are purely academic. If Exhibit A was executed subsequently, appellant's position is that the alleged contract of December 26, 1961 was superseded by the written consignment agreement.

To avoid appellant's arguments under this heading appellees advance the theory that the alleged financing arrangements and the written consignment agreement were part of some larger simultaneous agreement, although even now appellees say the consignment agreement was signed after the financing arrangements were made (page 25 of appellees' brief). Appellees argue that the consignment agreement was a limited agreement because it related only to U. S. brand tires (thereby implying Hank Wright's Sons, Inc. was to sell other brands made by appellant). However, appellees conveniently ignore, at this point, the provisions of paragraph 25 of the consignment agreement and the typewritten language on the bottom of page 1, R. 24 of the agreement, which, when read together, make it clear that Hank Wright's Sons, Inc. was to have only the U. S. brand of tires to sell.

By its terms the consignment agreement was an integrated document covering all tires Hank Wright's Sons, Inc. was to handle, which appellees have admitted signing after all alleged arrangements were made. It deals with matters in addition to those directly involved in a consignment; it sets out the full relationship of the parties. In fact, it directly contradicts a number of the key elements of the arrangements alleged by appellees. The exclusivity alleged in Contention 14 (c) (10), R. 17, is denied by paragraph 11 of the consignment agreement.

Extra discounts alleged in Contentions 14 (c) (3), (6), and (7), R. 17, are in conflict with paragraph 21 of the consignment agreement which limits discounts to those in prescribed schedules. A $200,000 line of credit, alleged in Contention 14 (b), R. 16, is inconsistent with paragraph 4 of the consignment agreement which called for prompt payments. Credit matters are touched upon again in paragraphs 7 and 26 of the consignment agreement.

Against this, appellees have only argued that the word "financing" does not appear in paragraph 25 of the consignment agreement and that the words "among other things" appear in paragraphs 19 and 20 thereof. We contend that the word "financing" is not necessary since paragraph 25 supersedes all agreements relating to the "selling" and "furnishing" of tire merchandise as well as the "consigning" of such merchandise. The language used in paragraph 25 contemplates the complete arrangements between the parties. If there were any doubt on this point the other terms of the written agreement make it clear.

Appellees' reliance on the words "among other things" in paragraphs 19 and 20 of the consignment agreement is unfounded. Obviously, the reference is to the many other things the parties have promised each other throughout the consignment agreement. That is the only natural way to read the agreement as a whole.

Whether the court considers Exhibit A, R. 28-29, referred to in Defendant's Contention 2, R. 20, as part of the pleading, (which we consider the appropriate treat-

ment), or as a matter outside the pleading and to be treated and disposed of under Rule 12 (c), Rules of Civil Procedure, as though it were a motion for summary judgment, is immaterial. If Exhibit A be considered as outside the pleading, the execution thereof by the parties is admitted by appellees and no conflicting documents or explanatory affidavits were offered by appellees, so there is no issue of fact involved. We submit that the court should deny recovery to appellee-trustee in bankruptcy for Hank Wright's Sons, Inc. because appellees have admitted (appellees' answering brief page 25) executing a document, Exhibit A, subsequent to the contract on which appellee-trustee is relying (Plaintiffs' Contentions 13, 14 and 15), that by its terms specifically superseded all prior arrangements and which was in conflict with major portions of the alleged prior contract.

CONCLUSION

In concluding their brief appellees at page 26 refer to matters covered by this appeal as being "prematurely raised on a motion for a summary judgment," with one possible exception, thus implying that this court should not consider the legal points we have raised in our specifications of error because genuine issues of material facts are present. Again we state that we are proceeding under Rule 12 (b) (6) as to all specifications of error, although Rule 12 (c) may be preferred as to the fourth specification of error, and if it is held as to this last specification of error that facts are before the

court outside the pleadings this is immaterial, as there is no dispute as to these facts.

Respectfully submitted,

ARTHUR S. VOSBURG
FRANK McK. BOSCH
VOSBURG, JOSS, HEDLUND & BOSCH
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR S. VOSBURG
Of Attorneys for Appellant